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TABLE OF CONTENTS

	Page
SUMMARY.....	iii
I. THE BUREAU SHOULD GRANT CIVIC'S CHANNEL CHANGE AND MAXIMIZATION REQUESTS CONSISTENT WITH COMMISSION PRECEDENT.	4
II. THE BUREAU SHOULD ALLOW CIVIC TO REVISE THE MAXIMIZATION PROPOSAL AS PART OF THIS PROCEEDING	10
III. CONCLUSION	13

SUMMARY

CivCo, Inc. (“Civic”), licensee of WLBT(TV), Jackson, Mississippi, by its attorneys, hereby petitions for reconsideration of the Media Bureau’s (the “Bureau’s”) Report and Order (“*Order*”) in MM Docket No. 01-43. The Bureau erroneously dismissed Civic’s request to substitute DTV Channel 9 for WLBT(TV)’s assigned DTV Channel 51.

Contrary to assertions in the *Order*, Civic in fact made the requisite statement of expression of continuing interest in the proposed allotment. In addition, however, Civic requested that the allotment for DTV Channel 9 not be made if intervening Bureau action should make it impossible for Civic to maximize its operations on the proposed allotment. Civic provided those parameters to the Bureau in its comments in the docket and requested waiver based upon the unique difficulties presented by the DTV transition and policy of Congress in the Community Broadcasters Protection Act to permit DTV stations to maximize their facilities.

The Bureau’s *Order* did not address Civic’s waiver request or the policy concerns that Civic presented to justify a waiver. Instead, the Bureau cited *Cut and Shoot, Texas*, as grounds for dismissing the proposal because of the contingent nature of Civic’s maximization request. The Bureau, however, has misapplied *Cut and Shoot* because the allotment proposed in the Notice in this Rule Making complies with Commission allotment principles without any action by third parties. In addition, *Cut and Shoot* itself allows for exceptions which manifestly are appropriate here. Under *Cut and Shoot*, countervailing benefits of expanded over-the-air service, meaningful replication, spectral efficiency, and increased broadcast diversity warrant processing of Civic’s proposal.

Moreover, the protection contingency that Civic requested continues to be met. The Bureau's conclusion that the requested maximization parameters can no longer be granted appears to be an artifact of changes in the Commission's interference software over the years that this proceeding has been pending. The difference in compliant power is only 200 watts out of 18,000 watts, so fully satisfactory maximization remains fully feasible. Given this and the three and one half years that this proceeding has been pending, it would be arbitrary and capricious for the Bureau to forfeit the abundant benefits that the proposal offers. The Bureau should avoid any further delay and grant Civic's channel change and maximization proposal, as revised herein.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Section 73.622(b),)	MM Docket No. 01-43
Table of Allotments,)	RM-10041
Digital Television Broadcast Stations)	
(Jackson, Mississippi))	

To: Chief, Video Division
Media Bureau

PETITION FOR RECONSIDERATION OF CIVCO, INC.

CivCo, Inc. ("Civic"), licensee of WLBT(TV), Jackson, Mississippi, by its attorneys and pursuant to Section 1.429 of the Commission's Rules,¹ hereby petitions for reconsideration of the Report and Order ("*Order*") in the above-referenced proceeding.² In the *Order*, the Commission dismissed Civic's petition to substitute DTV Channel 9 for WLBT(TV)'s assigned DTV Channel 51. Civic submits that the Media Bureau (the "Bureau") erroneously concluded its expression of interest in DTV Channel 9 was in any respect insufficient. Civic's maximization proposal, moreover, remains capable of fulfillment. The Bureau's conclusion to the contrary merely is an artifact of recent changes, never formally disclosed, in the Commission's technical processing software, and the anomaly is an easily remedied obstacle to the proposal. Civic's requested channel change proposal, as amended herein, would serve the public interest.

¹ 47 C.F.R. § 1.429 (2002). Civic is the successor-in-interest to Civic License Holding Company, Inc. Both companies have the same ultimate ownership.

² Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Jackson, Mississippi), *Report and Order*, MM Docket No. 01-43, DA 03-2925 (rel. Oct. 1, 2003). Public notice of the *Order* was given on October 7, 2003. Accordingly, this petition for reconsideration is timely filed. See 68 FR 57829 (Oct. 7, 2003); 47 C.F.R. §§ 1.429(d), 1.4(b).

Accordingly, for the reasons set forth herein, Civic respectfully seeks reconsideration and grant of its request for the allotment of DTV Channel 9 to WLBT(TV).

The Bureau stated that it dismissed the WLBT-DT allotment petition because it concluded that Civic had failed to express a sufficient continued interest in the facilities proposed in the proceeding's Notice of Proposed Rule Making. Civic had sought to allot Channel 9 to WLBT-DT because the initially allotted Channel 51 did not allow for meaningful DTV maximization. Contrary to the Bureau's characterization, Civic in fact made the requisite statement of expression of continuing interest in the proposed allotment. There never was any question that Civic requested parameters stated in the Notice of Proposed Rule Making and accepted them, thus fulfilling the obligations under the Notice. In addition, however, Civic requested that the allotment for Channel 9 not be made if intervening Bureau action should make it impossible for Civic to maximize its operations on the Channel 9 allotment. Civic provided those parameters to the Bureau in its comments in the docket, together with a request for a waiver based upon the unique difficulties presented by the DTV transition and policy of Congress in the Community Broadcasters Protection Act ("CBPA")³ to permit DTV stations to maximize their facilities.

The *Order* did not address Civic's waiver request or the policy concerns that Civic presented to justify a waiver. Instead, the Bureau cited *Cut and Shoot*⁴ as grounds for dismissing the petition because of Civic's request that the channel allotment not be made if intervening Commission action should preclude maximization. *Cut and Shoot*, however, does not apply

³ Public Law 106-113, as codified in Section 336(f) of the Communications Act of 1934, as amended, 47 U.S.C. § 336(f).

⁴ *Cut and Shoot, Texas*, 11 FCC Rcd 16383 (1996) ("*Cut and Shoot*").

here That decision deals with allotments that cannot be made under the Commission's Rules without action by third parties to the proceeding. Here, in contrast, the allotment can be made as requested in full accord with the Commission's allotment principles without any need for action by third parties.

Even if *Cut and Shoot* were read beyond its terms as setting forth some general principle regarding conditions like the one Civic requested, the decision itself acknowledges that some contingent allotments are justified, even in situations in which – unlike the circumstances here – third party action is required for the allotment to meet the Commission's Rules. As detailed below, the application either of *Cut and Shoot*'s exception or grant of waiver manifestly is appropriate here. Indeed, the justification for an exception is even stronger than when Civic first made the request, now more than three and one half years ago. As a party and beneficiary of a reciprocal interference agreement with a Channel 9 licensee, Civic is uniquely able to maximize its DTV facilities on Channel 9, thereby permitting the use of Civic's currently allotted DTV channel, Channel 51, by applicants for new service to the Jackson, Mississippi market.⁵ The protective contingency that Civic requested, moreover, continues to be met. As detailed below, the Bureau's conclusion that the requested maximization parameters can no longer be granted appears to be an artifact of changes in the Commission's allotment software. Fully satisfactory maximization continues to be fully feasible.

Given the time that this proceeding has been pending and the continued feasibility of Civic's maximization on the Channel 9 allotment requested, Civic submits that it would be arbitrary and capricious for the Bureau to forfeit, especially at this stage, the public benefit of

⁵ Civic subsequently submitted an interference agreement pursuant to Section 73.623(g) to allow maximization on DTV Channel 9.

expanding DTV service. Grant of the proposal would allow WLBT-DT to maximize facilities as Congress intended and avoid a potential loss of broadcast service if maximization were somehow precluded on DTV Channel 9. Grant would expand free, over-the-air service to the local community and improve signal coverage to viewers. In addition, a grant would clear the way for a new television station on Channel 51, which has been the subject of a number of long-standing applications filed before the Commission assigned the allotment to WLBT-DT. Accordingly, grant would contribute to increased spectral efficiency and broadcast diversity. The *Order* erroneously fails to consider any of these important benefits, each of which individually supports grant of the allotment.

I. THE BUREAU SHOULD GRANT CIVIC'S CHANNEL CHANGE AND MAXIMIZATION REQUESTS CONSISTENT WITH COMMISSION PRECEDENT.

In 1997, the Commission established DTV maximization policies to expand broadcast service and increase the number of persons who could receive free, over-the-air television.⁶ This policy especially was vital to smaller market stations facing a disproportionate DTV build-out burden. Civic's plans to avail itself of the Commission's maximization policies, however, were accelerated when Congress passed the CBPA in late 1999. The CBPA recognized the importance of digital maximization and accordingly established a brief window for submitting maximization applications that generally would take priority over low power Class A applications, a new primary service that the CBPA created.⁷

⁶ Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Sixth Report and Order*, 12 FCC Rcd 14588, ¶¶ 12-13, 29-31 (1997) ("*DTV Sixth Report and Order*").

⁷ Such requests for maximization were to be filed by May 1, 2000. See 47 U.S.C. § 336(f)(1)(D)(ii).

The existence of other stations precluded Civic from maximizing WLBT-DT on its allotted Channel 51, and, accordingly, to best satisfy the letter and spirit of the CBPA, Civic submitted, prior to the deadline, a petition for rule making to substitute Channel 9 – an allotment that allowed for maximization. Because it would have been impossible to complete the proposed rule making during the Congressionally established timeframe, Civic concurrently identified the technical parameters it sought for the maximization together with requests for waiver that candidly acknowledged the station's unusual procedural predicament.⁸ The concurrent submissions best satisfied Congress' intention to have the specifics of a proposed maximization known to the Commission and the public by a date certain.

By filing in this manner, Civic recognized that the Bureau first would need to act on the allotment petition prior to processing the WLBT-DT maximization application, and the waiver requests are so predicated. As also noted in the waiver requests, this sequence could have denied WLBT-DT the full opportunity to maximize because another station could have filed – contrary to Congressional intent – an intervening modification application or petition during the Commission's processing of the DTV Channel 9 rule making. In that event, WLBT-DT risked receiving an allotment for Channel 9 that precluded actual replication of the station's existing NTSC service, thereby resulting in a loss of service to viewers. To avoid the risk of diminished service and to give full effect to Congressional intent and the Commission's DTV policies, Civic made clear that the Bureau could avoid such potential service losses by assuring that WLBT-DT could maximize at a higher power, as was feasible both at the time the petition was filed on May 1, 2000 and remains feasible today. Civic accordingly stated that, without such assurances, the channel substitution should not be granted. Indeed, Civic arguably would have been acting

⁸ A copy of the maximization parameters and attendant waiver requests were incorporated

contrary to the public interest to have pursued the channel change without such a condition given the risk of service losses to Mississippi television viewers.⁹

In the *Order*, however, the Bureau denied the petition, concluding that Civic had not sufficiently expressed continuing interest in the lower power facilities as required under paragraph 2 of the Notice's Appendix.¹⁰ There never was any question, however, that Civic requested parameters stated in the Notice of Proposed Rule Making and accepted them, continues to do so, and understands that those would be the parameters of the allotment. Civic believes it is unreasonable to conclude that efforts to maximize digital facilities as Congress intended and to minimize service losses as the Commission would wish somehow could extinguish the continuation of this interest in a manner warranting dismissal of its petition.

To support its conclusion, the Bureau, citing *Cut and Shoot*, notes that it generally will not consider allotment proposals that are contingent upon the grant of another application.¹¹ The Bureau has misapplied *Cut and Shoot* to this proceeding. In *Cut and Shoot*, the proposed allotment was short-spaced to another station's licensed facilities but fully spaced to the unbuilt facilities specified in the other station's construction permit. The *Cut and Shoot* allotment petition, therefore, was contingent on a third party actually constructing the permitted facilities, and unless that contingency could be met, the allotment would not comply with the Commission's allotment principles.

into the proceeding as attachments to Civic's Petition for Rule Making.

⁹ See, e.g., *West Michigan Telecasters, Inc. v. FCC*, 460 F.2d 883 (D.C. Cir. 1972) (losses in service are *prima facie* inconsistent with the public interest and must be supported by a strong showing of countervailing factors).

¹⁰ *Order*, ¶ 5.

¹¹ *Id.* citing *Cut and Shoot*.

[REDACTED]

In *Cut and Shoot*, the Bureau explained that its concern about contingency flowed from the fact that the third party had no obligation to construct facilities authorized in a permit. Specifically, it stated that processing petitions for rule making that “rely on other events by third parties to effect . . . compliance . . . is not conducive to the efficient transaction of Commission business and imposes unnecessary burdens on . . . administrative resources.”¹²

In contrast, Civic’s proposed substitution of DTV Channel 9 is not contingent upon the grant of a third party application to comply with the Commission’s allotment rules, as in *Cut and Shoot*. Indeed, no contingent third party action whatsoever is required for the allotment to meet the Commission’s Rules. Rather, Civic expressed its interest in DTV Channel 9 subject to the Bureau’s willingness to authorize the new facility at a power level sufficient to avoid a loss of service to WLBT viewers. In other words, the only contingency is whether other parties – deliberately or otherwise – attempt to preclude grant of maximized facilities through the filing of their own modification proposals. Accordingly, Civic’s proposal is contingent upon the Bureau *not* granting a third party request that would subvert the maximization proposal – quite the opposite of *Cut and Shoot*.

Although the *Order* misapplies *Cut and Shoot*, Civic’s proposal actually furthers its underlying concerns about the efficient transaction of Commission business and the conservation of Commission resources. If an application precluded the WLBT-DT maximization after a grant of the requested Channel 9 allotment change, Civic’s need to avoid service losses would compel it to commence another proceeding simply to revert to the initially allotted Channel 51. This in turn would necessitate a major and unnecessary burden on the Commission’s resources, the policy underlying *Cut and Shoot* itself. Civic’s proposal instead allows the Bureau to address the

¹² *Cut and Shoot*, ¶ 4.

maximization request comprehensively in a proceeding in which the Bureau already has invested three and one half years and avoids the need for additional proceedings.

Civic recognizes that the Commission generally will not consider allotment petitions that are contingent upon the grant of another's application, and it acknowledges the concerns underlying the Commission's policy not to consider parameters specified in applications for unallotted channels. *Cut and Shoot* itself acknowledges that these prohibitions are not absolute. Countervailing public interest benefits warrant consideration of a petition for rule making that might be contingent in some fashion, and the Commission in the past has processed such rule making petitions, as *Cut and Shoot* recognizes.¹³ Indeed, as recently as May 2003, the Bureau reinstated and granted counter-proposals that were conditioned on the outcome of an effective but non-final rule making that ordered the relocation of an FM radio station from Anniston, Alabama, to an area just outside of Atlanta, Georgia.¹⁴ In that case, the Bureau specifically determined that, going forward, it would accept similarly contingent allotment proposals in the light of the public interest benefits that would flow from permitting broadcasters to pursue changes "that could result in new or improved service to the public earlier than they presently can."¹⁵

¹³ See *id.*, ¶ 5.

¹⁴ *Auburn, Northpoint, et al.*, Memorandum Opinion and Order, 18 FCC Rcd 10333, ¶ 21 (Audio Div. 2003). See also *Avalon, California, Notice of Proposed Rule Making*, 17 FCC Rcd 15618, ¶ 5 (Video Div. 2002), *Report and Order*, 17 FCC Rcd 17126 (Video Div. 2002)(processed allotment petition contingent upon licensing of third party's facilities because of Congressional deadline and third party's expressed intention to construct); *Pauls Valley and Healdton, Oklahoma, Notice of Proposed Rule Making*, 13 FCC Rcd 11896, n.1 (Alloc. Branch 1998), *Report and Order*, 14 FCC Rcd 3932 (Alloc. Branch 1999).

¹⁵ *Auburn, Northpoint, et al.*, ¶ 24.

Compelling and countervailing public interest benefits are abundant here, and there is no indication that the Bureau considered them. Foremost, grant would allow WLBT-DT to maximize facilities without subjecting viewers to the risk of service losses. Grant would expand free, over-the-air broadcast service to the local community and improve signal coverage. Maximized facilities on DTV Channel 9 would clear the way for the creation of a new television station on Channel 51 in Jackson,¹⁶ increasing spectral efficiency and broadcast diversity. The Commission has pledged broadcasters flexibility as they implement digital television service – an unprecedented government-driven initiative in itself – especially to those stations in smaller markets that are disproportionately burdened by the build-out.¹⁷ Finally, grant would effectuate the Congressional purpose that broadcasters should have a meaningful opportunity to maximize despite the existence of procedural obstacles that unduly exalt form over substance.¹⁸ Accordingly, granting Civic's proposal would expand and enhance coverage, result in more efficient broadcast spectrum use, and facilitate the conversion to digital television – each an important countervailing benefit that warrants processing of the petition.

The Bureau erred in not considering these countervailing benefits. To the extent the Bureau views *Cut and Shoot* as governing Civic's request, it is obliged to consider the public interest benefits of the proposal. Moreover, *WAIT Radio* requires that the Commission give a

¹⁶ See FCC File Nos. BPCT-19960710KU; BPCT-19960710KY; BPCT-19960711LI; BPCT-19960722KJ; BPCT-19960920LT; BPCT-19960930LW; BPCT-19961001UU; BPCT-19961001UV; BPCT-19961001UW

¹⁷ See, e.g., Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Fifth Report and Order*, 12 FCC Rcd 12809, ¶¶ 2, 78 (1997); *DTV Sixth Report and Order*, ¶ 172.

¹⁸ 47 U.S.C. § 336(f)(1)(D)(ii) and 336(f)(7)(A)(ii)(iv).

“hard look” to any waiver request.¹⁹ The Bureau therefore should reconsider its dismissal and accordingly grant Civic’s request for substitution of Channel 9 for WLBT-DT and its request for maximization.

II. THE BUREAU SHOULD ALLOW CIVIC TO REVISE THE MAXIMIZATION PROPOSAL AS PART OF THIS PROCEEDING.

The *Order* also determines that Civic’s proposed maximization of DTV Channel 9 at 18 kW “is not grantable” due to interference predicted to the licensed facility of KNOE-TV.²⁰ At the time of filing, Civic’s maximization proposal complied with the Commission’s Rules concerning predicted interference. Indeed, as explained above, the Bureau was free to grant the WLBT-DT channel change and maximization as proposed up until that time. Apparently, relatively recent changes to the way the Commission compiles its software analysis for interference predictions rendered Civic’s maximization proposal noncompliant.²¹ The Commission obviously can and should improve its interference analysis on an on-going basis, but the manifestations here do not materially or meaningfully modify the Commission’s interference predictions.

¹⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

²⁰ In footnote 3 of the *Order*, the Bureau asserts without explanation that the maximization proposal fails to satisfy maximum height and power limits under Section 73.622(f) of the Commission’s Rules. Civic has reviewed the proposal and finds it to be compliant. Civic understands that the facilities reflected in Appendix B of the *Second Memorandum Opinion and Order on Reconsideration of the DTV Fifth and Sixth Report and Orders* are based upon service replication, not maximization, and believes that the Bureau may grant its proposal consistent with this policy. See 14 FCC Rcd 1348 (1998). Accordingly, the Bureau’s statement appears to be no more than an inadvertent oversight.

²¹ See Attachment A, Technical Statement at 2.

Indeed, Civic now has determined, based upon a replica of the Commission's current *OET Bulletin No. 69* software, that reducing WLBT-DT's proposed ERP by a mere 200 watts (to 17.8 kW) would remove any question that the proposal complies. Such a change is so inconsequential that it would be arbitrary and capricious to preclude it. Nevertheless, out of an abundance of caution and to avoid the possibility that any future changes might render the WLBT-DT maximization proposal noncompliant, Civic hereby revises the proposed maximum ERP downward to 15 kW.²² This revision should allow a sufficient buffer to ensure the continued compliance of Civic's maximization proposal.

The Bureau should accept Civic's revised maximization proposal of 15 kW and grant Civic's petition for rule making. Section 1.429(b) of the Commission's Rules authorizes the consideration of new facts on reconsideration if such new facts relate to changed circumstances that were unknown to the petitioner through ordinary diligence until after its last opportunity to present them to the Commission, or if consideration of such new facts would serve the public interest.²³ Prior to the release of the *Order*, Civic had no reason to know that the Commission had modified its software in a manner rendering the 18 kW proposal noncompliant. By relying on the Commission's software, Civic made a good faith effort to determine a permissible ERP. If Civic had known that WLBT-DT at 18 kW ERP would cause impermissible interference under the modified software, Civic would have revised its proposal accordingly. Moreover, as demonstrated in the record and as summarized in the instant petition, numerous public interest benefits would flow from WLBT-DT operation on DTV with maximized facilities of 15 kW, including the freeing of Channel 51 for the inauguration of a new television service. As such,

²² See Attachment A, Technical Statement, which sets forth the revised proposal in detail and reiterates the necessary waiver requests.

consideration of the “new fact” of the revised maximization power level would serve the public interest.

The Commission previously has accepted revised proposals after the release of a Report and Order. For example, in *Los Ranchos*, the Bureau accepted the petitioner’s request to amend its allotment proposal after issuance of a Report and Order in the relevant allotment proceeding.²⁴ In its petition for reconsideration, the petitioner sought to downgrade its requested facilities, explaining that it had learned that another federal agency was opposed to a higher-powered station.²⁵ In granting the petitioner’s amended proposal, the Bureau concluded that “[t]he downgrading . . . could facilitate the early inauguration of improved service” and that “[g]rant of this request is in compliance with Section 1.429(b)(1) of the Commission’s Rules in that circumstances beyond the control of [the station] have changed since the Report and Order.”²⁶

As in *Los Ranchos*, Civic’s proposes to amend its prior request to operate WLBT-DT at a lower power than previously specified. Thus, any nearby stations concerned about potential interference would be impacted even less by the proposed downgrade. In addition, as in *Los Ranchos*, grant of Civic’s amended maximization proposal would facilitate the inauguration of improved service – in this case, digital television service in the Jackson, Mississippi DMA – as well as an entirely new service in the form of a new television station on Channel 51. Finally, as

²³ 47 C.F.R. § 1.429(b).

²⁴ See *Los Ranchos et al.*, *Memorandum Opinion and Order*, 2 FCC Rcd 7307 (Alloc. Br. 1987).

²⁵ *Id.*, ¶ 2.

²⁶ *Id.*, ¶ 3.

in *Los Ranchos*, it was only because of circumstances beyond Civic's control, namely changes in the Commission's processing software, that rendered its initial maximization proposal noncompliant. Therefore, as in *Los Ranchos*, the Bureau should consider and process Civic's amended proposal.

Civic seeks to ensure that the ability of WLBT-DT to maximize on Channel 9 is protected during the processing of the proposal. Indeed, Civic has explained that this ability to maximize is its primary interest in the DTV channel change. By determining that the 18 kW maximization proposal was noncompliant, the Bureau already has demonstrated its willingness to "look ahead" and evaluate Civic's request comprehensively. Civic asks no more of the Bureau than this. If the Bureau is persuaded upon reconsideration to grant the WLBT-DT channel change request, Civic simply asks that, at the time of such grant, it confirm at that time – as it would have to at some point to process the maximization application – that the maximization proposal remains grantable. To facilitate the Bureau's processing of this proposal, Civic is submitting a request for maximized facilities in the form of a construction permit application, to be available to the Bureau as necessary to implement the proposal.

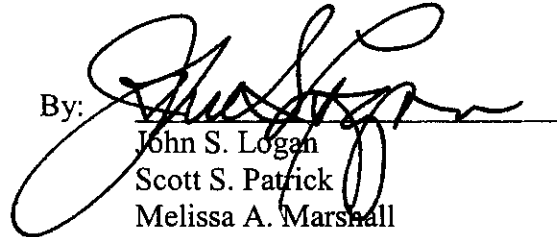
III. CONCLUSION

The Bureau should conclude that Civic expressed a sufficient and continuing interest in the lower power facilities for WLBT-DT set forth in the Notice. In addition, the Bureau should accept Civic's slight reduction to its maximization proposal at this stage to ensure compliance with the Commission's interference rules.

For the foregoing reasons, Civic respectfully requests that the Bureau grant the proposed channel substitution for WLBT-DT to avoid service losses, ensure service maximization and spectral efficiency, and expedite the DTV transition for Jackson area television viewers.

Respectfully submitted,

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Dated: November 6, 2003